INDEX

	Page
Opinions below	2
Jurisdiction	2
Questions presented for review	2-3
Constitutional provisions, statutes, and rules	3-4
Statement of the case	4-17
Reasons for granting the writ	17-24
Conclusion	25
Appendix A—Opinions below	A1-A8
Appendix B—Constitutional provisions, statutes and rules involved	B1-B4

CITATIONS

Cases: Page

Alabama ACLU v. Wallace, 456 F2d 1069 (CA5, March 3, 1972 21
Bailey v. Patterson, 369 US 31 (1963) 21
Board of Water & Sewer Commissioners v. Spriggs, 274 Ala 155, 146 So2d 872 (1962) .. 10 fn (1)
Brown v. Chastain, 416 F2d 1012 (CA5, 1964) 24
Bynam v. Commission, 410 F2d 173 (CA2, 1969) 20
Eitel v. Faircloth, 311 FSupp 1160 (DC, SD, Fla. 1970) 24
Moore v. Charlotte-Mecklenburg Board of Education, 402 US 47 (1971) 22
North Carolina Board of Education v. Swann, 402 US 43 (1971) 22
Rooker v. Fidelity Trust Co., 263 US 413 (1923) 24
State of Alabama v. U.S., 314 FSupp 1319 (DC,SD, Ala. 1970) 20
Swann v. Charlotte-Mecklenburg Board of Education, 312 FSupp 503 (1970) 19, 21
Taylor v. Kentucky State Bar, 424 F2d 478 (CA6, 1970) 20

Constitutional provisions, statutes, rules, etc.

Article III, Section 2, United States Constitution .. 2, 18
28 United States Code 1254 (1) 1
28 United States Code 2281 20
Act No. 1418, Reg Sess., Ala. Legislature, September 23, 1971 ..... 1, 2, 3, 4, 17, 19, 20, 22, 23
North Carolina Gen. Statutes, Section 115-1761.1 21,22
Report No. 92-798, 92nd Cong., 2nd Sess., Senate, p. 146 23
Equity Rule 37, Title 7, Code of Alabama, 1940 24

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1972

NO. 72-

GEORGE E. STRIPLING, et als.,
Petitioners

versus

LINDA STOUT, et als.,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioners, GEORGE E. STRIPLING, and others, respectfully pray that a writ of certiorari be issued out of and under the seal of this Court to review the judgment of the United States Court of Appeals for the Fifth Circuit rendered on the 7th day of September, 1972, which *affirmed* a judgment and order of the United States District Court for the Northern District of Alabama, a single judge court, declaring Act No. 1418, Regular Session, Legislature of Alabama, 1971, unconstitutional, and further enjoining petitioners, from relying upon said Act No. 1418.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit has not been reported as yet.

A copy of the pertinent part of this opinion relating to the issues herein presented is attached hereto as Appendix "A", p. A-1, *infra.*

The United States District Court for the Northern District of Alabama, in Civil Action 65-396, rendered an opinion and order, and the pertinent parts of this opinion are attached hereto in Appendix "A", pp. A-2 thru A-8, *infra.*

JURISDICTION

No formal judgment of the United States Court of Appeals for the Fifth Circuit was entered, but see opinion above dated September 7, 1972.

The statutory provision believed to confer jurisdiction upon this Court to review the judgment in question is 28 U.S. C. 1254 (1.)

QUESTIONS PRESENTED FOR REVIEW

1. Did the United States District Court for the Northern District of Alabama have before it a "case or controversy", according to Article III, Section 2, United States Constitution, involving Act No. 1418, Regular Session, Legislature of Alabama, 1971?

2. Was the United States District Court for the Northern District of Alabama authorized to determine the constitutionality of Act No. 1418, Regular Session, Legislature of Alabama, 1971, without the convening of a three-judge court pursuant to 28 U.S.C. 2281?

3. Was the United States District Court for the Northern District of Alabama, assuming it possessed the necessary jurisdiction as a one judge court to determine the constitutionality of Act 1418, Regular Session, Legislature of Alabama, 1971, correct in its decision, as affirmed by the United States Court of Appeals for the Fifth Circuit, that such Act No. 1418 was patently and on its face unconstitutional?

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

A.

Act No. 1418, Regular Session, Legislature of Alabama, 1971, approved by the Governor on September 23, 1971, reads as follows:

> "An Act, To prohibit the denial of admission of any child to any public school in this State under certain conditions.
>
> "*Section 1.* No student shall be denied admission to any public school in this State when, in the determination of such child's parents or legal guardian, the time or distance of travel to another school is so great as to risk the health or safety of the child or significantly impinge on the educational process.
>
> "*Section 2.* Upon a determination being made that the time or distance of travel to another school is so great as to risk the health or safety of the child or significantly impinge on the educational process, the parent or guardian shall make written application to the authorities of the

school to which the child is to be admitted, and the school authorities shall thereupon admit said child.

"*Section 3.* All laws or parts of laws which conflict with this Act are hereby repealed.

"*Section 4.* This Act shall become effective immediately upon its passage and approval by the Governor, or upon its otherwise becoming a law."

B.

Other constitutional provisions, statutes, and rules involved herein are set forth below in Appendix "B", pp. B-1, *et seq.*

STATEMENT OF THE CASE

Prior to the enactment into law of Act No. 1418, an AMENDED ORDER dated September 8, 1971, detailing school attendance zones for schools under the jurisdiction of the Jefferson County Board of Education in the *Linda Stout* case was filed in the United States District Court for the Northern District of Alabama. This AMENDED ORDER affected the children of petitioners by prescribing the schools which each should attend.

On October 18, 1971, petitioner GEORGE E. STRIPLING filed in the Circuit Court, Tenth Judicial Circuit of Alabama, Jefferson County, in Equity, his bill of complaint for both a temporary and mandatory injunction, being Case No. 168-839. On the same date in the same court and seeking like relief, petitioner CHARLES OWENS, and others, filed their bill, being Case No. 168-840.

In both bills for injunction the complainants detailed the factors upon which they, as parents, had made the determination required by Section 2 of Act 1418, and they sought a mandatory injunction to require respondent Jefferson County Board of Education to comply with the remaining portion of Section 2 of Act No. 1418 concerning admittance to a particular school.

The factors listed in the GEORGE E. STRIPLING case upon which the parental determination had been made were:

> "A. Zinnerman School (the AMENDED ORDER assigned school) is located approximately 4½ miles past Concord School (the neighborhood school), requiring a travel time of approximately 25 to 30 minutes. This daily additional travel of nine miles requires an additional 50 minutes to 1 hour of time. The travel time, from the home of GEORGE E. STRIPLING, to Concord School is approximately 10 to 15 minutes.
>
> "B. The additional travel to Zinnerman School requires that the school bus enter into Warrior Road, which road is a main artery of travel for many automobiles transporting persons at that time of the morning to Hueytown, Bessemer, Fairfield, and Birmingham. The route to Concord School does not entail entering or traveling any heavily utilized road.
>
> "C. After the daughter of GEORGE E. STRIPLING had ridden the school bus to Zinnerman School on several occasions she developed a nervous condition, which condition had not existed previously, and which required medical attention, and still requires medical attention."

The factors delineated in the CHARLIE OWENS, and others, case are as follows:

"A. Owens Children:

"1. From the home of the Owens children to Moton School (AMENDED ORDER assigned school) is 7 miles. From their home to Leeds Elementary School (neighborhood school) is 5 miles.

"2. The bus in which they ride has to cross two dangerous railroad crossings to get to Moton School.

"3. The school bus which they ride goes along Interstate Highway 20, which is a heavily traveled highway for 4 miles before it turns off on to Highway 78. The return trip is the same.

"4. In the mornings, before boarding the school bus, the children have to cross I-20, and then board the bus. The children's Mother has to cross I-20 with the children and there are no signs which say "all traffic stop while school buses load and unload" and traffic along said highway does not stop, and the speed limit along said I-20 is 70 miles per hour.

"5. The children have to leave home at 7:00 a.m. and do not return until approximately 4:00 p.m., a nine hour interval.

"6. The Moton School is situated in a undesirable area in the County and is not adequately patrolled by law enforcement officers.

"7. The children's bus in the afternoon, makes one run from the school, and returns to pick up the children for the second run and to the childrens place of de-boarding the bus which is on I-20.

"While waiting for the bus, the children are without school guidance or school protection.

"B. The Caldwell Child:

"1. From the home of Caldwell to Moton School is 11 miles and from his home to Leeds is 9 miles.

"2. The child has to leave home at 6:30 a.m. to board the bus to school and does not return until approximately 4:00 p.m.

"3. The ride to Leeds school is only 10 minutes from Caldwell's house and to Moton School takes approximately 30 minutes each way.

"4. The bus travels along a heavily travelled highway and has to cross two dangerous railroad crossings each way to and from Moton School.

"5. In the afternoon, Caldwell has to wait for the second load of children and in the meantime, the Caldwell child is without school guidance or protection.

"6. The school bus goes by Leeds School before it gets to Moton School.

"C. The McDaniel Child:

"1. The McDaniel child lives in the Lovick Community, and the bus travels two miles before reaching I-20. Upon reaching I-20, the bus has to cross two lanes of heavy traffic, stop at the median and then turn left on the other two lanes of heavy

"traffic and proceed along I-20 for 4 more miles before turning off on to Highway 78, and proceed to Moton School and then before getting to Moton School has to cross 2 dangerous railroad crossings.

"2. The school bus appears to be in bad condition and constitutes a danger and threat to the health and safety of McDaniel's child.

"3. The ride to Leeds by bus is 7 miles. The distance to Moton School is 9 miles.

"4. The McDaniel child has to catch the second load of children for his return home from the school in the afternoon, and as above stated, the child is without school supervision while awaiting the bus to go home.

"5. The return home is along the same dangerous route, i.e. the dangerous railroad crossings and the heavily travelled interstate where there are no signs to warn traffic of school buses."

Upon being presented with the verified bill of complaint in each case, the Honorable William C. Barber, Judge, Tenth Judicial Circuit of Alabama, in Equity Sitting, on October 18, 1971, ordered "that a temporary injunction shall forthwith issue to the respondents in accordance with the prayer of the Bill of Complaint." *I. e,* the STRIPLING child was to be admitted to Concord School, and the other children were to be admitted to Leeds Elementary School. The temporary mandatory injunctions issued according to the terms of these fiats of Judge Barber.

In its ANSWER TO BILL FOR TEMPORARY AND PERMANENT MANDATORY INJUNCTION

filed October 20, 1971, in each of Cases Nos. 168-839 and 168-840, Jefferson County Board of Education neither admitted nor denied the factors upon which the parental determinations were based and demanded proof thereof. The transfers prayed for had been approved.

In its AMENDMENT TO ANSWER TO BILL FOR TEMPORARY AND PERMANENT MANDATORY INJUNCTION filed October 29, 1971, the Jefferson County Board of Education added the following:

> "7. Respondents admit passage and approval of Act No. 1418 by the 1971 Legislature of Alabama, which said Act, as averred in paragraph 3, was approved on, to-wit, September 23, 1971. Under the Declaratory Judgment Act of Alabama (Title 7, Section 156, et seq., *1958 Recompiled Code of Alabama*) respondents request and move the Court for a declaration whether said Act is constitutional. Respondents aver that such declaration and determination by this Court is needed and required for their administration of the duties imposed upon them thereunder."
>
> • • •
>
> "Respondents respectfully move the Court and pray for a declaration of the validity, applicability and constitutionality of Act No. 1418 adopted by the 1971 Session of the Legislature of Alabama and approved September 23, 1971."

The pertinent portion of each final decree rendered on November 1, 1971, by Judge William C. Barber is as follows:

"* * *The substantive facts involved are not disputed.(1) The question involved is the applicability and constitutionality of Act No. 1418 of the 1971 Session of the Legislature of Alabama approved September 23, 1971 and set out in paragraph 3 of the verified bill. The respondents request a declaration of the applicability and validity of said Act under Title 7, Section 156, et seq. of the *1958 Recompiled Code of Alabama.*

"The Court finds that it has jurisdiction of the parties and issues here involved and raised by the pleadings, and specifically that *the parent of the student, in good faith, has made the determination provided and required by Act 1418, and that said determination is factually correct;* that the time or distance of travel to the school to which said student was previously assigned was 'so great as to risk the health or safety of the child or significantly impinge on the educational process'. (Emphasis supplied)

* * *

---

(1). As an aside, Judge Sam C. Pointer, Jr., in his MEMORANDUM OF OPINION AND ORDER dated December 3, 1971, obliquely casts a judicial frown upon the final decree of November 1, 1971, issued by Judge Barber by referring to the affidavits as "nothing". Judge Pointer cites *Board of Water & Sewer Comm'rs v. Spriggs*, 274 Ala 155, 146 So2d 872(1962). It has always appeared to be the rule that federal courts cannot control state court procedure (in the absence of federal constitutional violations), and the affidavits were a matter of Alabama procedure. Furthermore, *Spriggs* referred ONLY to a temporary injunction; the final decrees were the issuance of permanent mandatory injunctions. A bill for a permanent injunction in Alabama does NOT have to be verified; Judge Barber cannot be faulted for accepting the affidavits as ample proof for the issuance of permanent injunctions.

"* * * * It is, therefore, ORDERED, ADJUDGED and DECREED by the Court that:

"1. Said Act No. 1418 is constitutional and applies to and controls the transfer herein sought and ordered."

Meanwhile, the United States, as plaintiff-intervenor in the *Linda Stout* case, filed its PETITION FOR REMOVAL AND CONSOLIDATION on October 18, 1971, and, after setting forth the filing of the bills for temporary and permanent injunctions described above, sought an order:

"1. Removing to this Court the cases of *George Stripling v. Jefferson County Board of Education*, No. 168-839, and *Charles Owens, et al., v. Jefferson County Board of Education*, No. 168-840; as provided for by Title 28 §§ 1442 (a) (1), 1443 (2) and 1651.

"2. Vacating the Writs of Injunction entered in these cases on October 18, 1971.

"3. Consolidating the cases of *George Stripling v. Jefferson County Board of Education*, No. 168-839, and *Charles Owens, et al., v. Jefferson County Board of Education*, No. 168-840, with this case.

"4. The United States prays for such other and further relief as may be necessary or appropriate in aid of this Court's jurisdiction, pursuant to 28 U.S.C. § 1651."

EVEN THOUGH ADDITIONAL RELIEF WAS SOUGHT BESIDES A REMOVAL, THERE WAS NO SERVICE OF THIS PETITION on these petitioners here.

Also Linda Stout filed a pleading denominated MOTION FOR EMERGENCY RELIEF, dated October 26, 1971. After setting out the above matters, Linda Stout asked of the Court:

> "WHEREFORE, PREMISES CONSIDERED, plaintiff prays this Court will issue an order declaring Act 1418 of the 1971 Regular Session of the Alabama Legislature to be null, void and of no effect in the Jefferson County School system; and directing the defendants to disregard and ignore the said Act 1418 as it relates to student assignments and transfers in the Jefferson County school system***."

THERE WAS NO SERVICE OF THIS PETITION ON THESE PETITIONERS HERE.

The United States District Court for the Northern District of Alabama considered these pleadings, and, on October 29, 1971, entered an ORDER, filed November 1, 1971. (It will be noted that the final decrees in the state court cases were dated and filed November 1, 1971.) The thrust of this ORDER was for petitioners here to show cause:

> "***why an injunction should not be granted *** under the provisions of 28 U.S.C. § 2283 staying proceedings in such cases (Equity Nos. 168-839 and 168-840) and directing such parties not to enforce or be bound by such proceedings or any orders issued thereunder and not to further prosecute or defend such proceedings."

Thereupon, petitioners STRIPLING and OWENS, and others, filed in the United States Court of Appeals

for the Fifth Circuit on or about November 5, 1971, their PETITION FOR WRIT OF MANDAMUS, being Case No. 71-3205. In that petition STRIPLING, and others, stressed that the ORDER dated October 29, 1971, filed November 1, 1971, in fact, was predicated upon the premise that a determination of the constitutionality of Act 1418 was contemplated, and requested the Honorable Sam C. Pointer, Jr., be required to show cause why a three-judge court should not be convened for the determination of this question according to Title 28, § 2284, United States Code. This petition was denied on November 12, 1971.

Petitioners STRIPLING and OWENS, and others, in response to ORDER of October 29, 1971, filed November 1, 1971, did, on November 15, 1971, enter as a defense the plea of *res judicata* for that the Circuit Court, Tenth Judicial Circuit of Alabama, in Equity, had on November 1, 1971, declared Act No. 1418 constitutional.

Thereupon, on November 24, 1971, a NOTICE was forwarded by the clerk of the United States District Court for the Northern District of Alabama to the Governor and Attorney General of Alabama, which in pertinent part is as follows:

> "Please take notice that the Court will receive on or before December 3, 1971, briefs or other legal memoranda from your office in support of the Constitutionality of Act No. 1418, 1971 Regular Session of the Alabama Legislature. ***The Constitutionality of this Act may be involved in

"an ancillary proceeding now pending in this Court as a part of the above styled cause.* * *"(2)

PETITIONERS WERE NOT AT ANY TIME INVITED TO PRESENT TO THE COURT THEIR BRIEFS OR MEMORANDA IN SUPPORT OF THE CONSTITUTIONALITY OF ACT NO. 1418!

Furthermore, on November 15, 1971, the Jefferson County Board of Education filed pleadings denominated SPECIAL APPEARANCE AND MOTION TO STRIKE PETITION FOR REMOVAL AND CONSOLIDATION; MOTION TO REMAND; and RESPONSE TO ORDER DATED OCTOBER 29, 1971 AND FILED IN THE CLERK'S OFFICE ON NOVEMBER 1, 1971.

In its SPECIAL APPEARANCE AND MOTION TO STRIKE PETITION FOR REMOVAL AND CONSOLIDATION, the Jefferson County Board of Education properly pointed out to the Court that removal was not available to the United States since it was not a party to the state court actions, citing 28 U.S.C.A., Section 1446(a) and (b).

In its MOTION TO REMAND, predicated upon a removal in fact, the Jefferson County Board of Education sought a remand based upon the following grounds, among others:

---

(2)The fact that Judge Pointer did not actually accord the Governor and Attorney General an opportunity to support the constitutionality of Act No. 1418 has been the subject for investigation by the Senate Committee on the Judiciary.

"6. The relief sought in said state cases is consistent with the orders previously rendered in Civil Action 65-396-S by this Court.

"7. The transfers ordered in the state proceedings clearly fall within the 'hardship quota' established in orders of this Court rendered in CA 65-396-S on August 24, 1971 and September 8, 1971.

"8. It is the duty of this Court to reconcile federal and state jurisdictional action, wherever possible, and to avoid any conflict of jurisdiction or authority. The orders of this Court and the relief sought in the state court are consistent and can be reconciled with orders rendered or requested in the separate jurisdictions."

In its RESPONSE TO ORDER DATED OCTOBER 29, 1971, AND FILED NOVEMBER 1, 1971, the Jefferson County Board of Education stated, *inter alia*:

"3***to enjoin parties to a state action from 'further prosecuting or defending such proceedings' would be an unjustified and unwarranted conflict between state and federal authority when such conflict can be properly and judicially avoided under proper statutes and in appropriate cases by removal or remandment proceedings.

"4. This Court already has entered a separate order on October 29, 1971 removing from the Board its administrative right to grant hardship transfers commencing with the Spring 1972 semester.

* * *

"6. The transfers approved by the County Board, both in the state proceedings and otherwise, are within the limits prescribed by this Court in prior orders and so reported to the Court."

Without benefit of argument from STRIPLING and OWENS, and others, and under the facade of "ancillary proceedings", the United States District Court for the Northern District of Alabama, the Honorable Sam C. Pointer, Jr., rendered on December 3, 1971, its MEMORANDUM OF OPINION AND ORDER.

The Court quite properly held that the state court cases were not removable:

> "***Suffice it to say, this court, having serious doubts about such a power (inherent non-statutory removal), has declined the government's invitation to issue such an order, preferring instead to proceed under the well-established injunctive powers available under the All Writs Statute. Accordingly, the state court proceedings are not to be treated as removed to the federal forum as such."

The Court then declined to empanel a three-judge court stating:

> "This procedure is not, however, required when, as here, prior decisions make frivolous any claim that the state statutes on its face is not unconstitutional."(3)

The Court then proceeded to ORDER that Act No. 1418 was unconstitutional (Appendix "A", pp. A-2 thru A-8).

---

(3) If this conclusion be true, why were the Governor and Attorney General of Alabama invited to support the constitutionality of Act No. 1418?

The United States Court of Appeals for the Fifth Circuit AFFIRMED, citing two cases as authority, with no discussion (Appendix "A", p. A-1).

REASONS FOR GRANTING THE WRIT

Introduction

At the very heart of this petition is a request that this Court examine the procedures utilized in the United States District Court for the Northern District of Alabama in arriving at its judicial determination that Act No. 1418, Regular Session, Legislature of Alabama, 1971, be unconstitutional.

Expediency should never be a justification for ignoring mandated jurisdictional concepts and established procedural devices. It is submitted that in this case both jurisdictional and procedural requirements were swept aside; and the further ignoring of these requirements can only lead to ultimate disorder and chaos in United States District Courts wheresoever situated.

This is not the time nor the forum to argue the ultimate legality or judicial wisdom of busing orders to achieve racial balance in the schools of this country. Hence, no such argument is advanced, nor is it intended. What is intended, and which should be patent, is a most serious questioning of the *ad hoc* functioning of a United States District Court as a single member administrative school board, which fosters rule by men, and not by law, contrary to all precedents of nearly 200 years of federal courts under the United States Constitution.

I.

THE JUDICIAL POWER OF THE UNITED STATES DISTRICT COURTS EXTENDS ONLY TO "CASES AND CONTROVERSIES"

The first paragraph of Section 2 of Article III, United States Constitution, states the cases to which the judicial power of the United States extends.

> "The judicial Power shall extend to all Cases, in Law and Equity,*** (of certain sorts)."

Later the word "cases" is repeated, and later still the word is "controversies". To be within the federal judicial power, therefore, a matter must be either a "case" or "controversy". This would exclude administrative proceedings. Further, a "case" or "controversy", of necessity by definition, must present an existing dispute between real parties as to present legal rights and be presented in such a manner that the court can act judicially and with finality,

Petitioners here, GEORGE STRIPLING, and others, pose the question: WHO ARE THE PARTIES TO THE ISSUE OF THE CONSTITUTIONALITY OF ACT NO. 1418, AND HOW WAS THIS ISSUE PRESENTED AS A "CASE" OR "CONTROVERSY"?

Linda Stout did raise a question, but where is her standing as a real party in interest to an administrative function of the Jefferson County Board of Education? HOW DID THIS AFFECT HER? It is nowhere demonstrated in the proceedings below that the proceedings in the Tenth Judicial Circuit of Alabama were concerned with her school district or districts.

The issue of the constitutionality of Act No. 1418 was NOT tendered to these petitioners in the ORDER dated October 29, 1971, filed November 1, 1971. Their response to this ORDER did NOT involve the constitutionality of Act No. 1418. Then, patently, *ex mero motu*, the Court decreed Act No. 1418 unconstitutional. A "case" or "controversy" presupposes a properly submitted issue for judicial consideration and determination. No such issue was presented below!

Swann v. Charlotte-Mecklenburg Board of Education, 312 FSupp 503(1970), is instructive as to the procedures which are required to bring before a United States District Court those parties who are necessary to present a "case" or "controversy".

In *Swann*, the federal court plaintiffs in the original federal desegregation case, comparable to *Stout* here, moved the district court to add the state plaintiffs, such as petitioners were here, as additional parties defendant in the federal suit, and to dissolve the *temporary* restraining order. This was granted, and a three-judge court requested. In another state case, the state plaintiffs were made defendents in the federal case, and also the defendants filed a petition for removal. A three-judge court was also requested; empanelled; and the two cases consolidated.

In the lower court in this case, there is no semblance of any such procedure being followed. In fact, and this is most evident, it appears the United States District Court *ex mero motu* made its own issue, and forthwith decided it, and all without parties, particularly these petitioners who were the complainants in the state court suits.

It is submitted *Swann* furnishes a guide for the proper development of a "case" or "controversy", and that guide should be approved by this Court in the interest of preserving the constitutional grant of judicial power.

II.

A THREE-JUDGE UNITED STATES DISTRICT COURT IS REQUIRED TO DECLARE A STATE LEGISLATIVE ACT UNCONSTITUTIONAL

Title 28, Section 2281, United States Code, is clear that a three-judge court is required to declare a state statute unconstitutional. *E. g., Bynum v. Commission*, 410 F2d 173 (CA2, 1969); *Taylor v. Kentucky State Bar*, 424 F2d 478 (CA6, 1970).

Normally, in the Fifth Circuit, it has been the preferred practice, in all but exceptional cases, to initially constitute a three-judge district court to allow it to determine the substantiality of the federal question alleged. See *State of Alabama v. U.S.*, 314 FSupp 1319 (DC, SD, Ala 1970) (It is noted that actually a three-judge court was NOT required in the cited case because the constitutionality of the statute involved had not been questioned!).

Assuming that Linda Stout did present an attack on the constitutionality of Act No. 1418, and did further comply with 28 United States Code, Section 2281, the practice of the Fifth Circuit was not followed, based upon the assumed conclusion that the statute was unconstitutional on its face. In the lower court, the North Carolina *Swann* cases were relied upon heavily to support this conclusion.

Since this aspect of this case is so intertwined with the proposition that the statute was NOT unconstitutional on its face, the Court is requested respectfully to consider the following discussion as being directly applicable to this proposition.

III.

IT IS ONLY WHERE *PRIOR DECISIONS* MAKE UNSUBSTANTIAL OR FRIVOLOUS THE CLAIM THAT A STATE STATUTE ON ITS FACE IS NOT UNCONSTITUTIONAL THAT A THREE-JUDGE COURT IS NOT REQUIRED TO BE CONVENED

The United States Court of Appeals for the Fifth Circuit cited *Bailey v. Patterson*, 369 U.S. 31(1963), and *Alabama ACLU v. Wallace*, 456 F2d 1069(CA5, March 3, 1972), as its authority that determination of the constitutionality of Act No. 1418 did not require the convening of a three-judge court.

Bailey was based on the proposition that the question of nonsegregated service in interstate and intrastate commerce had been settled by prior decisions of this Court.

Alabama ACLU was predicated on the proposition that the non-validity of Bible-reading statutes had been established by prior decisions of this Court.

As to Act 1418, there has been no prior decision of this Court invalidating any statute of similar import, or language. The lower court relied on *Swann v. Charlotte-Mecklenburg Board of Education*, 312 FSupp 503(1970); affirmed on direct appeal, 402 US 43(1971).

The pertinent portion of North Carolina General Statutes § 115-1761.1 involved is:

> "No student shall be assigned or compelled to attend any school on account of race, creed, color or national origin, or for the purpose of creating a balance or ratio of race, religion or national origins. Involuntary bussing (sic) of students in contravention of this article is prohibited, and public funds shall not be used for any such bussing (sic)."

In the first place, the language of this statute does not approximate the language of Act No. 1418!

Further, the language of this Court in *North Carolina Board of Education v. Swann*, 402 US 43 (1971), must be examined:

> "The legislation before us flatly forbids assignment of any student on account of race or for the purpose of creating a racial balance or ratio in the schools. The prohibition is absolute, and it would obstruct the remedies granted by the District Court in the Swann case.*** At 402 US 45.
>
> • • •
>
> "We likewise conclude that an absolute prohibition against transportation of students assigned on the basis of race, 'or for the purpose of creating a balance or ratio,' will similarly hamper the ability of local authorities to effectively remedy constitutional violations.***" At 402 US 46.

Compare *Moore v. Charlotte-Mecklenburg Board of Education*, 402 US 47 (1971).

Act No. 1418 does NOT, it is submitted, on its face hamper the ability of local authorities to remedy effectively constitutional violations. Act No. 1418 was interpreted in the state court as containing the requirement

that the parental determination be made in good faith and be factually correct; the hearing court further concluded in its final decrees that being factually correct there was a risk to health or safety of the child or that there was a significant impingement on the educational process. This, then, was NOT an unfettered "freedom of choice" reposing in the parents.

The language of Act 1418 is comparable to that in the Education Amendments of 1972. Title VIII, Section 802(a), entitled "Prohibition Against Use Of Appropriated Funds For Busing", reads in part:

> *"****No such funds shall be made available for transportation when the time or distance traveled is so great as to risk the health of the children or significantly impinge on the educational process of such children,****"* (Emphasis supplied).

See Conference Report, Report No. 92-798, 92nd Congress, 2nd Session, Senate (To accompany S.659), p. 146. Act 1418 parallels this language, and, as interpreted by the Alabama court, permits a good faith, factual determination to be made by the parent or legal guardian of a school child.

It is submitted the constitutional issue cannot be denominated as "frivolous".

Inter alia, the Court should be made aware that Linda Stout possessed knowledge of the issuance of the fiat in the state court on October 18, 1971, for she filed her MOTION FOR EMERGENCY RELIEF on October 26, 1971.

Alabama procedure is very clear that Linda Stout could have intervened in the state court cases, if she so desired. See Equity Rule 37 (Appendix "B", p. B-3). However, she permitted those proceedings to terminate in final decrees on November 1, 1971, which final decrees upheld the constitutionality of Act No. 1418.

The state court of Alabama was competent to pass upon the federal constitutional question involved. There was no intervention by Linda Stout, and had she intervened she could have appealed to the Supreme Court of Alabama, and, in the event of an adverse decision there, the road to this Court was all green lights.

There are present, then, overtones of a federal district court review of a final determination by a state court of a federal question. See *Brown v. Chastain*, 416 F2d 1012 (CA5, 1969); *Rooker v. Fidelity Trust Co.*, 263 US 413 (1923); *Eitel v. Faircloth*, 311 FSupp 1160 (DC, SD, Fla, 1970). This dual jurisdiction was invited to the attention of the lower court by the Jefferson County Board of Education in one of its responses to the ORDER of October 29, 1971.

In a word, the proceedings in the lower court were developed so haphazardedly, without these petitioners here being made parties, that it is impossible to ascertain what actually transpired.

Such proceedings do not, and cannot, comport with the well-disciplined jurisdiction and procedure of a United States District Court.

CONCLUSION

It is submitted that in the interest of a reasonably certain method of procedure in the United States District Courts, and one which follows Article III, United States Constitution, that this Court should issue the writ, and decide the questions presented after full briefing and argument.

Respectfully,

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OCTOBER, 1972

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 72-1120*

LINDA STOUT, ET AL.,
Plaintiffs,

UNITED STATES OF AMERICA,
Plaintiff-Intervenor-Appellee,

CHARLES OWENS, ET AL.,
Movants-Appellants

versus

JEFFERSON COUNTY
BOARD OF EDUCATION, ET AL.,
Defendants-Appellees

(September 7, 1972)

Before THORNBERRY, CLARK, and INGRAHAM, Circuit Judges.
BY THE COURT: * * *

NO. 72-1102 is AFFIRMED. *See Bailey v. Patterson*, 369 U.S. 31 (1962); *Alabama ACLU v. Wallace*, 456 F.2d 1069 (5th Cir., 1972).

*The United States Court of Appeals for the Fifth Circuit consolidated three other cases with the present one, either at the suggestion of the parties, or by the Court for its own convenience. All of the cases relate to desegregation of the schools operated by the Jefferson County Board of Education. Petitioners have included here only that portion of the opinion which pertains to the Alabama statute concerning busing of students. Pertinent portions of the opinion and order of the United States District Court are included hereafter.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

LINDA STOUT, et al.,	)	
Plaintiffs	)	
—vs.—	)	CIVIL ACTION
JEFFERSON COUNTY BOARD OF EDUCATION, et al.,	)	NO. 65-396
Defendants	)	

MEMORANDUM OF OPINION AND ORDER

This proceeding, ancillary to the Jefferson County school desegregation case which has been pending in this court and federal appellate courts since 1965, involves the effect of recent actions of Alabama's legislative, executive and judicial branches upon a portion of the desegregation plan ordered by this court. The procedural questions presented in this proceeding make appropriate a brief chronology of the events leading to this order:

* * * * *

September 23, 1971. "Anti-busing law," Act No. 1418, Regular Session of Alabama Legislature, signed into law by Governor. According to this statute, "No student shall be denied admission to any public school in this state when, in the determination of such child's parents or legal guardian, the time or distance of travel to another school is so great as to risk the health or safety of the child or significantly impinge on the edu-

"cational process. Upon a determination being made that the time or distance of travel to another school is so great as to risk the health or safety of the child or significantly impinge on the educational process, the parent or guardian shall make written application to the authorities of the school to which the child is to be admitted, and the school authorities shall thereupon admit said child."

* * * * *

III. THREE-JUDGE COURT UNNECESSARY

Proceedings to enjoin the operation of state statutes for conflict with the national Constitution typically requires the empanelling of a three-judge court. 28 U.S.C. §§ 2281, 2284. This procedure is not, however, required when, as here, prior decisions make frivolous any claim that the state statute on its face is not unconstitutional. *Bailey v. Patterson*, 369 U.S. 31, 33 (1962). Such a panel was held to be unnecessary in a recent decision invalidating an earlier, but similar, Alabama "freedom-of-choice" statute:

> The settled state of the law convinces us that there is no substantial federal question presented in this case. Where . . . the subject Act conflicts with an order of a federal court drawing its authority from the Fourteenth Amendment, the Act is unconstitutional and must fail. The supremacy clause of our compact of government will admit to no other result. *State of Alabama v. United States*, 314 F. Supp. 1319 (S.D.Ala.1970)[6]

6. Also see footnote 17, 314 F.Supp. at 1323. The case *sub judice* involves a proceeding against county school authorities.

Also see the cogent opinion by Judge Lawrence in *Stell v. Savannah-Chatham Board*, ___F.Supp.___ (S.D.Ga. 1971) (November 19, 1971; No. 1316) (holding unconstitutional a recent freedom-of choice statute passed by the Georgia legislature).

Given the consistent record of past Alabama school statutes in the federal forum, which need not be recited here, one may wonder why still another should wind its way through the legislative processes at this late date. The answer lies in the rather disingenious extraction of one sentence from the *Swann* decision and its remolding into statutory form. The sentence in question is the following:

> Any objection to transportation of students may have validity when the time or distance of travel is so great as to risk either the health of the children or significantly impinge on the educational process. 402 U.S. at 30-31.

The distortion comes from conveniently overlooking that this "objection" was not set up as one of controlling significance to be applied by parents, but rather one of a number of factors to be considered in the adoption of an overall attendance plan initially by a school board and subsequently by the federal court. As previously indicated, footnote 5, *supra*, the Charlotte-Mecklenburg plan approved by the Supreme Court in *Swann* involved student assignments which, on the average, added 7 miles distance beyond the "neighborhood" school, the Court remarking that "desegregation plans cannot be limited to the walk-in school." 402 U.S. at 30.

On analysis, the new Alabama statute, which on its face[7] gives parents the absolute right to require school boards to assign their children to schools other than those prescribed under a desegregation plan, is but a "freedom-of-choice" option dressed in slightly different clothing. Such options have been previously ruled out for the Jefferson County school system, at least until a unitary system has been in operation for a sufficient length of time to escape the tendency such option would have towards re-establishing a dual system.[8] *United States v. Jefferson County Board.* 417 F.2d 834

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7. The state court decisions purport to find not only that the parents made a "determination" under Act No. 1418, but also that various factors listed as grounds therefor were true. Nothing in the statute would require such an evaluation, and in the cases before the state court such findings were made without any evidence being offered even though such matters were not admitted in the pleadings. See footnote 3 *supra* regarding the "verification" of the state court complaints.

8. This is not to say that attendance zone plans must eliminate all choice. Rather, provisions allowing optional "majority-to-minority" transfers are standard in this circuit and were approved in *Swann.* Likewise, another standard provision in this circuit permits transfers between two school systems where the cumulative effect does not in either system reduce desegregation. See *Stout v. Jefferson County School Board, sub nom., Singleton v. Jackson Municipal Separate School District,* 419 F.2d 1218 (5th Cir. 1970). Also see 419 F.2d 1221 (Bibb County, Georgia, system). The key is that the transfer options must be so conditioned or limited as to avoid any interference with the process of conversion into a unitary system. See *Lemon v. Bossier Parish School Board,* ___F.2d___(5th Cir. 1971) (August 24, 1971; No. 71-2523): "New sprouts permitting freedom of choice of schools, classes and subjects, which might even remotely tend to perpetuate segregation, must not be allowed to bud."

(5th Cir. 1969); *Cf. United States v. Jefferson County School Board*, 372 F.2d 836,889 (5th Cir. 1966), 380 F.2d 385 (5th Cir. 1967) ("a schoolchild has no inalienable right to choose his school"). Also see *State of Alabama v. United States*, 314 F.Supp.1319 (S.D.Ala. 1970).

The fate of Act 1418, if not determined by cases involving earlier Alabama statutes, is clearly fixed by the Supreme Court's decision in *North Carolina State Board of Education v. Swann*, 402 U.S. 43, issued on the same day as the basic *Swann* decision. There, in a case involving machinations of the three branches of government of North Carolina quite similar to those of Alabama in the present dispute, the Supreme Court invalidated North Carolina's Anti-busing statute. Speaking for a unanimous court, the Chief Justice said:

> (I)f a state-imposed limitation on a school authority's discretion operates to inhibit or obstruct the operation of a unitary school system, it must fall; state policy must give way when it operates to hinder vindication of federal constitutional guarantees. The legislation before us flatly forbids assignment of any student on account of race or for the purpose of creating a racial balance in the schools. The prohibition is absolute, and it would inescapably operate to obstruct the remedies granted by the District Court in the *Swann* case. . . . We likewise conclude that an absolute prohibition against transportation of students assigned on the basis of race, "or for the purpose of creating a balance or ration," will similarly hamper the ability of local authorities to effectively remedy constitutional violations. 402 U.S. at 45-46.

Portions of the opinion of the district court[9] regarding North Carolina law are particularly pertinent to Alabama Act No. 1418: "The flaw in this legislation is its rigidity." (312 F.Supp. at 508)

"We merely hold today that North Carolina may not validly enact laws that prevent the utilization of any reasonable method otherwise available to establish unitary school systems." (312 F. Supp. at 510). So here, the vesting in parents of absolute rights to negate school assignments made by school authorities operating under the review of the federal courts inescapably operates to obstruct an effective remedy for constitutional violations.

IV. REMEDY

The District Court, upon learning that a state court has enjoined a school board from implementing a desegregation plan ordered by the federal courts, is to take immediate action, through use of the injunctive process or otherwise, to the end that the board may implement such plan. *Lockett v. Muscogee County Board*, __F. 2d __(5th Cir. 1971) (August 30, 1971,No.71-2490). Also see *North Carolina State Board of Education v. Swann*, 402 U.S. at 44, footnote 2.

* * * * *

V. ORDER

On the findings and conclusions above indicated, it is hereby ORDERED:

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9. The North Carolina district court concluded that a three-judge panel was necessary. The case *sub judice* comes 20 months and many decisions (including the Supreme Court's *Swann* opinions), later.

1. That Alabama Act No. 1418, 1971 Regular Session, be, and it hereby is, declared unconstitutional.

• • •

3. That Charles Owens *** (and others) be, and they hereby are, enjoined from enforcing, seeking to enforce, or relying upon, Alabama Act No. 1418, and from further prosecuting, defending, or otherwise being bound by Cases Nos. 168-139 and 168-140, presently pending in the Circuit Court for the Tenth Judicial Circuit of Alabama in Equity. ***.

• • •

DONE AND ORDERED this the 3rd day of December, 1971.

s/Sam C. Pointer, Jr.
United States District Judge

I.

CONSTITUTION OF THE UNITED STATES, ARTICLE III, SECTION 2 (IN PART):

Section 2. The judicial power shall extend to all cases, in law and equity, arising under this constitution, the laws of the United States, ***.

II.

TITLE 28, SECTION 1254(1), UNITED STATES CODE:

Cases in the courts of appeal may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;***

III.

TITLE 28, SECTION 1446(a), UNITED STATES CODE:

(a) A defendant or defendants desiring to remove any civil or criminal prosecution from the State court shall file in the district court of the United States for the district and division within which such action is pending a verified petition containing a short and plain statement of the facts which entitle him or them to removal together with a copy of all process, pleadings and orders served upon him or them in such action.

* * *

(e) Promptly after the filing of such petition and bond the defendant or defendants shall give written notice

thereof to all adverse parties and shall file a copy of the petition with the clerk of such State court, which shall effect the removal and the State court shall proceed no further unless and until the case is remanded.

* * *

IV.

TITLE 28, SECTION 2281, UNITED STATES CODE:

An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under the State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

V.

TITLE 28, SECTION 2283, UNITED STATES CODE:

A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

VI.

TITLE 28, SECTION 2284, UNITED STATES CODE:

In any action or proceeding required by Act of Congress to be heard and determined by a district court of three

judges the composition and procedure of the court, except as otherwise provided by law, shall be as follows:

(1) The district judge to whom the application for injunction or other relief is presented shall constitute one member of such court. On the filing of the application, he shall immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge. Such judges shall serve as members of the court to hear and determine the action or proceeding.

(2) If the action involves the enforcement, operation or execution of State statutes or State administrative orders, at least five days notice of the hearing shall be given to the governor and attorney general of the State.

* * *

Such notice shall be given by registered mail or by certified mail by the clerk and shall be complete upon the mailing thereof.

* * *

VII.

EQUITY RULE 37, CODE OF ALABAMA, 1940, TITLE 7:

Intervention. By petition filed by leave of court on motion, and on notice to the parties of record of the hearing of the motion as prescribed by the court, any one shall be permitted to intervene in a suit when the representation of the petitioner's interest by existing parties is or may be inadequate, and the applicant is or may be prejudiced by a decree in the suit or when the applicant is so situated as to be adversely affected by a

distribution or other disposition of property in the custody of the court or an officer thereof; or on other grounds which the court may deem sufficient.

The petition shall set forth the ground for intervention and the facts supporting them; and the court shall prescribe in the order allowing the filing, the time allowed other parties to demur to or to answer the petition if so advised, and testimony may be taken thereon, if the averments require proof.

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-798

GEORGE E. STRIPLING, ET AL., PETITIONERS

v.

JEFFERSON COUNTY BOARD OF EDUCATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

This case involves the desegregation of the public schools of Jefferson County, Alabama. Petitioners are parents of white children attending the Jefferson County School System who filed a separate cause of action in state court naming the Jefferson County Board of Education as defendant and alleging that pursuant to Act No. 1418 (Regular Session, Legislature of Alabama, 1971), petitioners were entitled to have their children enrolled at schools other than the schools to which they were assigned under the plan of desegregation ordered by the United States District Court. The state court issued temporary injunctions directing the Jefferson County School System to enroll petitioners' children at the school they desired to

402-725—73——1

attend. On November 1, 1971, the injunctions were made permanent and the state court held Act No. 1418 to be constitutional.

Upon motion by the plaintiffs in the present case, on October 29, 1971, the district court entered an order directing the parties to the state court litigation to show cause why the state proceedings should not be enjoined pursuant to 28 U.S.C. 2283. On December 3, 1971, the district court below enjoined petitioners "from enforcing, seeking to enforce, or relying upon, Alabama Act No. 1418, and from further prosecuting, defending or otherwise being bound by" the the state court cases and declared Act No. 1418 unconstitutional (App. 17–18, *infra*).[1]

The court of appeals summarily affirmed on September 7, 1972.

The district court found that Act No. 1418

> on its face gives parents the absolute right to require school boards to assign their children to schools other than those prescribed under a desegregation plan [and] is but a "freedom-of-choice" option dressed in slightly different clothing. [App. 14, *infra*.]

Since the district court further found that the state court injunctions issued pursuant to Act No. 1418 interfered with the orderly implementation of the court-ordered plan of desegregation, the district court had authority to protect the Board of Education from

[1] Petitioners' appendix does not contain the entire text of the December 3, 1971, opinion and order of the district court. Since portions of the opinion not included may be relevant to the issues before this Court, we have reprinted the entire opinion and order as an Appendix to this memorandum.

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the inconsistent state court orders and to take steps necessary to effectuate its own judgments. 28 U.S.C. 2283; *Lockett* v. *Board of Education of Muscogee County School District*, 447 F. 2d 472, 473 (C.A. 5). See also *Leiter Minerals, Inc.* v. *United States*, 352 U.S. 220; *National Labor Relations Board* v. *Nash-Finch Co.*, 404 U.S. 138; *Sheridan* v. *Garrison*, 415 F. 2d 699 (C.A. 5); *Baines* v. *City of Danville*, 337 F. 2d 579, 593 (C.A. 4).

It was unnecessary to impanel a three-judge court to determine the constitutionality of the Act since the courts below found that the Act, by its terms, would allow parents to negate the attendance patterns established and approved by the district court to disestablish the dual school system of Jefferson County and that the Act was therefore contrary to *North Carolina State Board of Education* v. *Swann*, 402 U.S. 43, 45. *Bailey* v. *Patterson*, 369 U.S. 31, 33; *Alabama ACLU* v. *Wallace*, 456 F. 2d 1069 (C.A. 5); *Bush* v. *Orleans Parish School Board*, 138 F. Supp. 336 (E.D. La.); *State of Alabama* v. *United States*, 314 F. Supp. 1319, 1322-1323 (S.D. Ala.).

Since the courts below applied well settled legal principles to the facts of this case, further review is not warranted.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

DAVID L. NORMAN,
Assistant Attorney General.

JANUARY 1973.



APPENDIX

United States District Court, Northern District of Alabama, Southern Division

Civil Action No. 65-396

[Filed, December 3, 1971]

LINDA STOUT, ET AL., PLAINTIFFS

vs.

JEFFERSON COUNTY BOARD OF EDUCATION, ET AL., DEFENDANTS

Memorandum of Opinion and Order

This proceeding, ancillary to the Jefferson County school desegregation case which has been pending in this court and federal appellate courts since 1965, involves the effect of recent actions of Alabama's legislative, executive and judicial branches upon a portion of the desegregation plan ordered by this court. The procedural questions presented in the proceeding make appropriate a brief chronology of the events leading to this order:

> April 20, 1971. Decisions of the Supreme Court in *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1; *Davis* v. *School Comm'rs of Mobile County*, 402 U.S. 33; and *North Carolina State Board of Education* v. *Swann*, 402 U.S. 43.

July 16, 1971. Decision of Fifth Circuit Court of Appeals in *Stout v. Jefferson County Board of Education,* No. 29886 and 30387. The Jefferson County school case was remanded to the district court with instructions, *inter alia,* to require the Jefferson County Board of Education (hereafter "the Board") to implement a student assignment plan for 1971–72 in conformity with the principles enunciated in *Swann.*

August 12, 1971. Board's plan filed in district court. This plan divided the county into mandatory, contiguous attendance zones, with no provisions for transfers other than under the standing majority-to-minority rule previously made applicable in Jefferson County.

September 8, 1971. Plan for desegregation of schools for 1971–72 approved by district court. This plan, adopted after a hearing, involved various changes from the Board's proposal, but was still grounded on the division of the County into mandatory, generally contiguous, attendance zones. Attendance at schools other than in the zone of the student's actual residence was prohibited with certain specified exceptions.[1]

September 23, 1971. "Anti-busing law," Act. No. 1418, Regular Session of Alabama Legislature, signed into law by Governor. According to this statute, "No student shall be denied admission to any public school in this state when, in the determination of such child's parents or legal

[1] The order of September 8th, together with the orders of August 24 and 25, 1971, which it amended, has been appealed to the Fifth Circuit Court of Appeals in certain particulars. So far as can be determined, none of the appeals or cross- appeals attacks the proscriptions against transfers for reasons other than those permitted by the order, or attacks any of the four attendance zones here involved (with the exception that plaintiffs seek a mid-year pairing of the Moton and Leeds schools).

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guardian, the time or distance of travel to another school is so great as to risk the health or safety of the child or significantly impinge on the educational process. Upon a determination being made at the time or distance of travel to another school is so great as to risk the health or safety of the child or significantly impinge on the educational process, the parent or guardian shall make written application to the authorities of the school to which the child is to be admitted, and the school authorities shall thereupon admit said child."

October 1–8, 1971. Applications made to school authorities by parents of Owens, Caldwell and McDaniel children that they be permitted to attend Leeds E.S. (rather than Moton, the school in their attendance zone under the court order) and by the parent of the Stripling child that she be permitted to attend Concord E.S. (rather than Zinnerman, the school in her attendance zone under the court order). (Moton and Zinnerman were formerly all black schools; the children here involved are white.)

October 18, 1971. (1) Complaints filed in the Circuit Court for Jefferson County by parents of above indicated children against the Board and the principals at Leeds and Concord. The complaints alleged that (a) the children were assigned to Moton and Zinnerman schools by the federal court order, (b) Act No. 1418 had been subsequently enacted, (c) they had as parents made determinations under the Act that the children should be assigned to Leeds and Concord (and stating their reasons for such determinations), and (d) the school authorities had not granted their applications for such reassignments. They asked that the school authorities be ordered to permit such reassignments under Act No. 1418. (2) Temporary injunc-

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tions issued *ex parte* by the state court requiring school authorities to enroll the students at Leeds and Concord. (3) Petition filed in federal district court in 65–396 by United States (an existing plaintiff by intervention), asking that the injunctions issued by the state court be vacated and such causes be removed to the federal court.

October 20, 1971. Answers filed in state court by school authorities, (a) admitting the attendance zones for the students under the federal court order, (b) admitting passage of Act No. 1418, (c) demanding proof of allegations regarding the parents' determinations under Act No. 1418, and (d) stating that, pursuant to the temporary injunction, they had approved the prior applications for transfer.[2]

October 26, 1971. Petition filed in federal district court (65–396) by plaintiffs therein, asking that Act No. 1418 be declared unconstitutional and that the Board be directed to reassign the students to the schools located in the zones of their respective residences.

October 29, 1971. (1) Amended answers filed in state court by school authorities, asking for declaratory judgment whether Act No. 1418 is valid and constitutional. (2) Order by federal district court (65–396) directed to parties in state court actions that they show cause, if any, why the district court under 28 U.S.C. § 2283 should not stay the state court proceedings and enjoin such parties not to pursue or be bound by such actions.

November 1, 1971. Final decrees entered in state court, declaring Act No. 1418 constitutional and viable in Jefferson County, and making permanent the temporary injunctions. These decrees were rendered on the bills of complaint

[2] The answers indicate that copies of the transfer applications were being attached thereto. However, the state court files do not contain any such applications.

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and the answers as amended, without taking any evidence.[3]

November 5, 1971. Petition in Fifth Circuit Court of Appeals by state court plaintiffs, asking that the proceedings in the federal district court be halted or that a three-judge panel be convened under 28 U.S.C. § 2281.

November 12, 1971. Order of Fifth Circuit, denying state court plaintiffs' petition.

November 15, 1971. Responses filed in federal district court by parties to state court actions. State court plaintiffs recite the actions in the state court and assert them to be "res judicata" to federal court proceedings. State court defendants (school authorities) challenge any "removal" of state court proceedings since not sought by a party to such proceedings, assert that federal injunctive relief would be an unwarranted conflict with state judicial proceedings inasmuch as there are [or were until the time expired] rights of removal, and contend that the actions taken on these transfers pursuant to the state court decrees are not in conflict with the desegregation plan ordered by the federal court.

November 24, 1971. Notice given by federal district court to Governor and Attorney General of Alabama that a ruling would be deferred until December 3, 1971, to permit filing of briefs or memoranda in support of the constitutionality of Act No. 1418. (Briefs have not been filed.)

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[3] The state court described the bills of complaint as verified or sworn. However, it would appear that, under the highly technical rules of pleading in Alabama, the type of affidavit used on the complaints would have been held, on proper objection, as "amount[ing] to nothing." See *Board of Water & Sewer Comm'rs* v. *Springgs*, 274 Ala. 155, 146 So. 2d 872 (1962).

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I. Status of Proceedings (suit held not removed)

Some confusion has arisen regarding whether or not the state court proceedings have been removed to the federal court. The only petition filed in this court asking for removal has been that of the United States, not a party to the state court proceedings. As the statutory procedures for removal, 28 U.S.C. §§ 1441-51, are available only to parties defendant, 7B Moore's Federal Practice, JC–671, 704, it is clear that the filing by the United States of its petition did not *ipso facto* effect a removal. It may be, as argued by the United States (citing as authority the unreported Louisiana Western Division case of *Graham* v. *Evangeline Parish School Board*), that under the Supremacy Clause of the Constitution there exists an inherent non-statutory power in the federal court to direct removal of state court actions which can be exercised under the All Writs Statute, 28 U.S.C. § 1651(a). Suffice it to say, this court, having serious doubts about such a power, has declined the government's invitation to issue such an order, preferring instead to proceed under the well-established injunctive powers available under the All Writs Statute. Accordingly, the state court proceedings are not to be treated as removed to the federal forum as such.

II. Injunction Under 28 U.S.C. § 2283

The Board, as part of its answer to the show cause order, has asserted that there is no conflict between the actions taken under the state court decrees and the provisions of the federal court order. If true, this would appear to preclude issuance of an injunction by the federal court since not "necessary in aid of its jurisdiction, or to protect or effectuate its judgment." 28 U.S.C. § 2283.

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In support of this contention the Board states that, even with the five transfers directed by the state court, it is still within the limits allowed in the federal court order for hardship transfers. This court, in its order of September 8, 1971, had granted the Board:[4]

> the right to grant intra-system transfers to students on the basis of exceptional and compelling hardship unique to the student or the student's family. In no year may transfers under this provision be granted to more than ½ of one percent (.5%) of the total number of students in the system. Such transfers shall be made on a non-discriminatory basis for non-racial reasons and must be supported by detailed documentation of the reasons for the transfer. (Paragraph IV(e).)

The Board's argument is faulty in two respects. First, the concept of the federal court order in this regard was to give to the *Board* a limited discretionary power to treat the most meritorious of problems caused by mandatory attendance zones—the effect of Alabama's Anti-busing Statute and of the state court decisions enforcing it is to withdraw this discretion from the Board and give it to parents, presumably on a first-come first-served basis if subject to any limitations. Secondly, it is clear from a reading of the state court complaints that, with the possible exception of the Stripling child (a particular health problem), the grounds stated for the transfer request were hardly

[4] By order of October 29, 1971, following a hearing which reflected that many transfers had been granted by the Board for other than exceptional, compelling and unique reasons adequately documented, this court transferred such discretionary powers, commencing with the Spring 1972 semester, to an independent five member committee appointed by the court.

"exceptional and compelling"[5] and certainly not "unique."

Moreover, the state court decrees, to which the Board was a party, held the Anti-busing Statute to be constitutional and applicable in the Jefferson County school system. Such a holding quite clearly comes in direct conflict with the provisions of the desegregation plan ordered by this court.

In summary, the provisions of 28 U.S.C. § 2283 do not constitute a bar to the granting of injunctive relief by this court.

III. Three-Judge Court Unnecessary

Proceedings to enjoin the operation of state statutes for conflict with the national Constitution typically require the empanelling of a three-judge court. 28 U.S.C. §§ 2281, 2284. This procedure is not, however, required when, as here, prior decisions make frivolous any claim that the state statute on its face is not unconstitutional. *Bailey* v. *Patterson,* 369 U.S. 31, 33 (1962). Such a panel was held to be unnecessary in a recent decision invalidating an earlier, but similar, Alabama "freedom-of-choice" statute:

> The settled state of the law convinces us that there is no substantial federal question pre-

[5] The additional one-way distance for four of the children is 2 miles, with the assertion that this adds 20 minutes of travel time; as to the fifth child the claim is that there is an additional one-way distance of 4½ miles, adding 25 to 30 minutes of time each way. The Supreme Court in *Swann* approved a plan which involved adding an average of 7 miles distance, with as much as 35 minutes additional time, to the time and distance involved in attending the school nearest the students' homes. The Fifth Circuit, in a post-*Swann*-decision, has labelled increases of 1½ to 4 miles each way as "relatively short." *United States* v. *St. Johns County School District,* —— F. 2d —— (July 15, 1971; No. 30413).

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> sented in this case. Where * * * the subject Act conflicts with an order of a federal court drawing its authority from the Fourteenth Amendment, the Act is unconstitutional and must fail. The supremacy clause of our compact of government will admit to no other result. *State of Alabama* v. *United States,* 314 F. Supp. 1319, 1323 (S.D. Ala. 1970).[6]

Also see the cogent opinion by Judge Lawrence in *Stell* v. *Savannah-Chatham Board,* —— F. Supp. —— (S.D. Ga. 1971) (November 19, 1971; No. 1316) (holding unconstitutional a recent freedom-of-choice statute passed by the Georgia Legislature).

Given the consistent record of past Alabama school statutes in the federal forum, which need not be recited here, one may wonder why still another should wind its way through the legislative processes at this late date. The answer lies in the rather disingenious extraction of one sentence from the *Swann* decision and its remolding into statutory form. The sentence in question is the following:

> An objection to transportation of students may have validity when the time or distance of travel is so great as to risk either the health of the children or significantly impinge on the educational process. 402 U.S. at 30–31.

The distortion comes from conveniently overlooking that this "objection" was not set up as one of controlling significance to be applied by parents, but rather one of a number of factors to be considered in the adoption of an overall attendance plan initially by a school board and subsequently by the federal court. As previously indicated, footnote 5 *supra,* the Charlotte-Mecklenburg plan approved by the Supreme

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[6] Also see footnote 17, 314 F. Supp. at 1323. The case *sub judice* involves a proceeding against county school authorities.

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Court in *Swann* involved student assignments which, on the average, added 7 miles distance beyond the "neighborhood" school, the Court remarking that "desegregation plans cannot be limited to the walk-in school." 402 U.S. at 30.

On analysis, the new Alabama statute, which on its face [7] gives parents the absolute right to require school boards to assign their children to schools other than those prescribed under a desegregation plan, is but a "freedom-of-choice" option dressed in slightly different clothing. Such options have been previously ruled out for the Jefferson County school system, at least until a unitary system has been in operation for a sufficient length of time to escape the tendency such option would have towards reestablishing a dual system.[8] *United States* v. *Jefferson County Board*, 417

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[7] The state court decisions purport to find not only that the parents made a "determination" under Act No. 1418, but also that various factors listed as grounds therefor were true. Nothing in the statute would require such an evaluation, and in the cases before the state court such findings were made without any evidence being offered even though such matters were not admitted in the pleadings. See footnote 3 *supra* regarding the "verification" of the state court complaints.

[8] This is not to say that attendance zone plans must eliminate all choice. Rather, provisions allowing optional "majority-to-minority" transfers are standard in this circuit and were approved in *Swann*. Likewise, another standard provision in this circuit permits transfers between two school systems where the cumulative effect does not in either system reduce desegregation. See *Stout* v. *Jefferson County Board*, *sub nom.*, *Singleton* v. *Jackson Municipal Separate School District*, 419 F. 2d 1218 (5th Cir. 1970). Also see 419 F. 2d 1221 (Bibb County, Georgia, system). The key is that the transfer options must be so conditioned or limited as to avoid any interference with the process of conversion into a unitary system. See *Lemon* v. *Bossier Parish School Board*, —— F. 2d —— (5th Cir. 1971) (August 24, 1971; No. 71-2523): "New sprouts permitting freedom of choice of schools, classes and subjects, which might even remotely tend to perpetuate segregation, must not be allowed to bud."

F. 2d 834 (5th Cir. 1969). *Cf. United States* v. *Jefferson County Board*, 372 F. 2d 836, 889 (5th Cir. 1966), 380 F. 2d 385 (5th Cir. 1967) ("a schoolchild has no inalienable right to choose his school"). Also see *State of Alabama* v. *United States*, 314 F. Supp. 1319 (S.D. Ala. 1970).

The fate of Act No. 1418, if not determined by cases involving earlier Alabama statutes, is clearly fixed by the Supreme Court's decision in *North Carolina State Board of Education* v. *Swann*, 402 U.S. 43, issued on the same day as the basic *Swann* decision. There, in a case involving machinations of the three branches of government of North Carolina quite similar to those of Alabama in the present dispute, the Supreme Court invalidated North Carolina's Anti-busing statute. Speaking for a unanimous court, the Chief Justice said:

> [I]f a state-imposed limitation on a school authority's discretion operates to inhibit or obstruct the operation of a unitary school system or impede the disestablishing of a dual school system, it must fall; state policy must give way when it operates to hinder vindication of federal constitutional guarantees. The legislation before us flatly forbids assignment of any student on account of race or for the purpose of creating a racial balance in the schools. The prohibition is absolute, and it would inescapably operate to obstruct the remedies granted by the District Court in the *Swann* case. * * * We likewise conclude that an absolute prohibition against transportation of students assigned on the basis of race, "or for the purpose of creating a balance or ratio," will similarly hamper the ability of local authorities to effectively remedy constitutional violations. 402 U.S. at 45–46.

Portions of the opinion of the district court* regarding the North Carolina law are particularly pertinent to Alabama Act No. 1418: "The flaw in this legislation is its rigidity." (312 F. Supp. at 508) "We merely hold today that North Carolina may not validly enact laws that prevent the utilization of any reasonable method otherwise available to establish unitary school systems." (312 F. Supp. at 510). So here, the vesting in parents of absolute rights to negate school assignments made by school authorities operating under the review of the federal courts inescapably operates to obstruct an effective remedy for constitutional violations.

IV. Remedy

The District Court, upon learning that a state court has enjoined a school board from implementing a desegregation plan ordered by the federal courts, is to take immediate action, through use of the injunctive process or otherwise, to the end that the board may implement such plan. *Lockett* v. *Muscogee County Board*, —— F. 2d —— (5th Cir. 1971) (August 30, 1971, No. 71-2490). Also see *North Carolina State Board of Education* v. *Swann*, 402 U.S. at 44, footnote 2.

In the present case the duty is clear in one respect: to declare Alabama Act No. 1418, 1971 Regular Session, unconstitutional, and to direct the Jefferson County school authorities to disregard the provisions of that Act as relates to assignment of students in their system. As to the five students transferred by the state court proceedings under that Act, a some-

*The North Carolina district court concluded that a three-judge panel was necessary. The case *sub judice* comes 20 months and many decisions (including the Supreme Court's *Swann* opinions), later.

what different situation is presented. This court is reluctant to order the re-transfer of such students during the middle of the school semester, with its attendant disruptions, particularly where this court has on another occasion permitted students improperly transferred under the transfer provisions of the court's order to complete the present semester at the transferee school. A similar ruling appears most just in the present case, the court being mindful that the students too frequently find themselves confronted with conflicting directions from the home, the school, and the courts.

V. Order

On the findings and conclusions above indicated, it is hereby ORDERED:

1. That Alabama Act No. 1418, 1971 Regular Session, be, and it hereby is, declared unconstitutional.

2. That for the remainder of the Fall 1971 semester, Susan Stripling shall be permitted to remain as a student at Concord E.S., and Steve Owens, Frances Owens, Robert Allen Caldwell, and Debra Caldwell shall be permitted to remain as students at Leeds E.S. For the Spring 1972 semester such students shall be permitted to attend Jefferson County schools only in strict conformity with the provisions of the "desegregation plan" then in effect for such system under applicable federal court orders, and without regard to the provisions of Alabama Act No. 1418 or to the provisions of the decrees previously entered by the Circuit Court for the Tenth Judicial Circuit of Alabama, in Equity, Cases Nos. 168-139 and 168-140.

3. That Charles Owens, Sinda Lou Owens, Major A. Caldwell, Marvelene Caldwell, Charlie McDaniel, George E. Stripling, the Jefferson County Board of

Education, George M. Rogers, C. R. Bottenfield, W. A. Jenkins, Jr., Mrs. R. W. Gwin, O. W. Gresham, J. Revis Hall, Jessie Kaylor, and Joe Shepherd, and their respective officers, agents, servants, employees, attorneys, and all others in active concert or participation with them who receive actual notice hereof, be, and they hereby are, enjoined from enforcing, seeking to enforce, or relying upon, Alabama Act No. 1418, and from further prosecuting, defending, or otherwise being bound by Cases Nos. 168-139 and 168-140, presently pending in the Circuit Court of the Tenth Judicial Circuit of Alabama in Equity. The provisions of paragraph number 2 above of this order shall constitute an exception to the provisions of this paragraph to the limited extent therein provided.

4. That applications for other relief by the federal court plaintiffs or intervening plaintiff, specifically the award of attorneys fees, is hereby denied.

5. That the attention of all parties is directed to Part III of *Singleton* v. *Jackson Municipal Separate School District,* 419 F. 2d 1211 (5th Cir. 1969), with the change however that three legible copies of all matters pertinent to the issues presented on an appeal are to be filed. No extension from the schedule established in *Singleton* will be allowed except by order of the panel of the Fifth Circuit to which the appeal is assigned.

DONE AND ORDERED this the 3rd day of December, 1971.

SAM C. POINTER, JR.,
United States District Judge.

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